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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1995

CONTEL CELLULAR INC. AND
CONTEL CELLULAR OF ILLINOIS, INC.,

Petitioners,

v.

LEAF RIVER VALLEY CELLULAR TELEPHONE
CO., INC., AND CENTRAL CELLULAR
TELEPHONES, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Communications Commission's exclusive jurisdiction over cellular telecommunication licenses under sections 310 and 332 of the Communications Act preempts the Illinois state courts from asserting jurisdiction, under section 414 of the Act, over an action in contract and tort that involves the right to receive profits from ownership of a license issued by the Federal Communications Commission where such participation in ownership of the license would conflict with FCC regulations, 47 C.F.R. § 22.942, prohibiting ownership of both licenses in the same market.

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

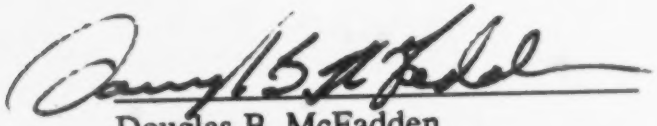
Parties to the proceeding below are also parties herein except Rockford MSA Limited Partnership.

Petitioners, Contel Cellular Inc. and Contel Cellular of Illinois, Inc. are subsidiaries of GTE Corporation, a publicly-held corporation with subsidiary companies which are engaged in a variety of telecommunications businesses. GTE Corporation has the following subsidiaries or affiliates which have outstanding securities in the hands of the public:

BC TELECOM, Inc.
Caribbean Reservation Center, C. por A.
Communicaciones Telefonicas, C. por A.
Florence Cellular Telephone Company, Inc.
GTE California Incorporated
GTE Directories Corporation Lanka (PVT.) Ltd.
GTE Florida Incorporated
GTE Hawaiian Telephone Company Incorporated
GTE North Incorporated
GTE Northwest Incorporated
GTE South Incorporated
GTE Southwest Incorporated
Jacksonville Cellular Telephone Corp.
Jacksonville Cellular Communications, Inc.
La Compagnie de Telephone Anglo-Canadienne/
Anglo-Canadian Telephone Company
MTX Italia

Parque Industrial ITABO, S.A.
Quebec-Telephone
Radiowealth, Inc.
The Micronesian Telecommunications Corporation
Wilmington Cellular Telephone Corp.
Wilmington Cellular Communications, Inc.
Zona France Las Americas

Respondents, Leaf River Valley Cellular Telephone Co., Inc. and Central Cellular Telephones, Ltd. are subsidiaries of Telephone and Data Systems, Inc. ("TDS"), a company whose stock is publicly traded. Respondents Leaf River Valley Cellular Telephone Co., Inc. and Central Cellular Telephone Co., Inc. are partially owned by United States Cellular Investment Company of Rockford, which also is a TDS subsidiary.



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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in case No. 79010 on October 4, 1995.

OPINION BELOW

The underlying opinion of the Circuit Court for the 17th Judicial Circuit of Illinois, issued on October 12, 1994, is appended hereto (A - 1); the opinion of the Appellate Court of Illinois, Second District in No. 2-94-1303, affirming the Circuit Court, is appended hereto (A - 10); the order of the Supreme Court of Illinois in No. 79010 denying the petition for leave to appeal is appended hereto. (A - 18).

JURISDICTIONAL STATEMENT

The order of the Supreme Court of Illinois denying the petition for leave to appeal was entered on October 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Art. VI, Clause 2:

> This Constitution, and the law of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .

47 U.S.C. § 151:

> For the purpose of regulating interstate and

foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 301:

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of

> energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 310(d): Assignment and transfer of construction permit or station license.

> No construction or station license, or any rights thereunder shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. . . .

47 U.S.C. § 332(c)(3): State preemption.

> (A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 414: Exclusiveness of chapter.

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at

common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 C.F.R. § 22.942[1]: Limitations on interests in licensees for both channel blocks in an area.

> No person may have a direct or indirect ownership interest in licensees for both channel blocks in overlapping cellular geographic service areas (CGSAs), unless such interests pose no substantial threat to competition. A licensee, a person that owns a controlling interest in a licensee, or person that actually controls a licensee for one channel block in a CGSA must not have any direct or indirect ownership interest in the licensee, a person that owns a controlling interest in a licensee, or a person that actually controls a licensee for the other channel block in a overlapping CGSA.

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[1]The FCC reorganized the rules governing cellular radiotelephone service, effective January 1, 1995. The "cross-block" ownership restriction and transfer of control provisions were not substantively changed insofar as they relate to this case. In previous briefs below and the appellate court opinion it was cited as 47 C.F.R. § 22.902(b); in this petition, it is cited by its new number, 47 C.F.R. § 22.942. The assignment of authorization/transfer of control provision, cited as 47 C.F.R. § 22.39 below is cited as 47 C.F.R. § 22.137 herein. The former text of these rules is found in the appendix to this Petition at A - 43.

(a) A direct or indirect ownership interest of 5% or less in both systems is automatically excluded from the general rule prohibiting multiple ownership interests. Interests of less than 5% are considered and are not excluded from the general rule prohibiting multiple ownership interests in cases of persons or entities that own a small percentage of the licensee but nonetheless actually control the licensee, a person that owns a controlling interest in the licensee, or a person that actually controls the licensee.

(b) Divestiture of interests as a result of a transfer of control or assignment of authorization must occur prior to consummating the transfer or assignment.

47 C.F.R. § 22.137: Assignment of authorization; transfer of control.

Authorizations in the Public Mobile Services may be assigned by the licensee to another party, voluntarily or involuntarily, directly or indirectly, or by transfer of control of a licensee holding such authorizations, only upon approval by the FCC. The assignee is responsible for ascertaining that the stations facilities are and will remain in compliance with the terms and conditions of the authorization to

be assigned.

> (a) Application required. The assignor or transferor must file an application for approval of assignment or transfer of control (FCC Form 490). In the case of involuntary assignment, such application must be filed no later than 30 days after the event causing the assignment. The assignee or transferee must file a report qualifying it as a common carrier (FCC Form 430) unless a current report is already on file with the FCC.

* * *

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Respondents, Leaf River Valley Cellular Telephone Co., Inc. and Central Cellular Telephones, Ltd., (hereinafter collectively referred to as "Leaf River" or "respondents") each brought separate actions against petitioners Contel Cellular Inc. and Contel Cellular of Illinois, Inc. (both hereinafter collectively referred to as "Contel" or "petitioners"). Both respondents alleged that Contel breached its partnership agreement and fiduciary duties in applying for and ultimately being awarded the license from the Federal Communications Commission

("FCC") to operate a cellular telephone system in rural northwest Illinois. Respondents alleged that a provision in the partnership agreement required that Contel's application for the license should have been deemed to be on behalf of the partnership holding the license from the FCC in Rockford. Respondents seek to have Contel turn over its profits from the rural cellular system to the Rockford partnership. (A - 27-29; A - 39-41)

Contel moved the circuit court to either dismiss these cases on the grounds of federal preemption under the Supremacy Clause of the Constitution of the United States or stay them pursuant to the doctrine of primary jurisdiction so that the FCC could determine whether federal communications laws and regulations barred the conduct and relief sought by Leaf River.

The circuit court denied both petitioners' motion to dismiss and the motion for a stay on October 12, 1994. (A - 6). Petitioners filed their Notice of Interlocutory Appeal on November 10, 1994. The Appellate Court affirmed the Circuit Court on March 21, 1995 (A - 17). On April 11, 1995, petitioners filed their affidavit of intent to seek leave to appeal to the Illinois Supreme Court. On April 25, 1995, petitioners filed a petition for leave to appeal in the Supreme Court of Illinois. Petitioners raised the question of federal preemption before both the Appellate Court and the Supreme Court of Illinois. The Supreme Court of Illinois denied the petition for leave to appeal on October 4, 1995. (A - 18).

STATEMENT OF FACTS

In May of 1986, the Rockford MSA Limited Partnership ("Rockford Partnership") was formed by petitioner, Contel Cellular Inc., respondent, Leaf River Valley Cellular Telephone Co., Inc., respondent, Central Cellular Telephones, Ltd., and non-party Ameritech Communications, Inc.[2] Ameritech and Leaf River are limited partners in the Rockford Partnership. Contel is both a limited partner and the general partner in the Rockford Partnership. (C. 103-04.). The Rockford Partnership was formed to provide cellular telephone service in the Rockford, Illinois metropolitan area pursuant to a license issued by the FCC. (C. 98-99).

Pursuant to its regulation of the cellular telecommunications industry, the FCC has divided the United States into geographic service areas. Urban areas are designated as Metropolitan Statistical Areas ("MSA"); more rural areas are designated as Rural Service Areas ("RSA"). The FCC's rules and regulations provided for the licensing in each MSA and RSA of two competing cellular telephone systems, known as "Block A" and "Block B." Each operates pursuant to permits and licenses granted and approved by the FCC. (C. 102). The FCC designated Rockford, Illinois as an MSA. (C. 103). The Rockford Partnership holds the Block B license for the Rockford MSA. (C. 103.)

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[2]In July 1987, Contel Cellular Inc. transferred all its interest in the Rockford Partnership to Contel Cellular of Illinois, Inc. (C. 103-04.) Citations to the Record shall appear as "(C. _____)".

Originally, the Block B license was awarded to a company having a wireline (or landline) telephone presence in the service area, while the Block A license was awarded to an entity which was not a landline telephone company. (C. 102, 328-29). Although the wireline and nonwireline distinction is no longer used for licensing, the FCC rules and regulations prohibit an entity from holding an interest in both the Block B and Block A license in the same MSA or RSA. (C. 329-30, Supp. Rec. 78-79.)

On September 16, 1988, Contel filed an application with the FCC in the name of Contel Cellular Inc. to obtain an authorization to construct and a license to operate the Block B license for a cellular telecommunications system known as Illinois RSA 1.[3] On March 22, 1989, the FCC released to the public the names of the wireline applicants for May 25, 1989 lottery. (Supp. Rec. 167-69.) The eligible competing applicants were as follows:

1. Ameritech Mobile Communications Inc.
2. Contel Cellular Inc.
3. Alltel Mobile Communications of Illinois
4. GTE Mobilnet Incorporated
5. Leaf River Rural Cellular Telephone Co.
6. Centel Cellular Company

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[3]Illinois RSA 1 is sometimes referred to as "Illinois 1 - Jo Daviess" in some FCC documents. (Supp. Rec. 169.) It consists of the counties of Jo Daviess, Stephenson, Caroll, Ogle, De Kalb, Whiteside, and Lee, three of which adjoin the Rockford MSA. (C. 106.)

(Supp. Rec. 169.)

On May 26, 1989, the FCC announced that Contel was the winning applicant. Subsequently, Contel formed the Illinois RSA 1 Limited Partnership, (C. 106), in which it is the general partner. (Supp. Rec. 172.)

In September 1990, the FCC awarded Illinois RSA 1 Limited Partnership the FCC permit to construct a cellular system for Block B in Illinois RSA 1; in October of 1990, the FCC awarded to that partnership the license to operate the cellular system for Block B in Illinois RSA 1. (C. 106.) In December 1990, the FCC approved Contel's application to transfer its interest in the Illinois RSA 1 Limited Partnership to Contel of Illinois. (C. 107.) The Illinois RSA 1 Limited Partnership continues to provide telecommunications service in Illinois RSA 1 to the present day. Prior to FCC action on each of the applications the public was afforded the opportunity to object to FCC action. Respondents did not object to any of the actions taken by the FCC.

Illinois 01 Partners held the FCC license for the Block A, non-wireline license in competition with Contel in Illinois RSA 1. Sterling Resources Inc., was the majority partner in Illinois 01 Partners. In June of 1992, an application was made to the FCC to transfer the majority interest that Sterling Resources Inc. held in Illinois 01 Partners to United States Cellular Operating Co. ("USCOC") (Supp. Rec. 202-03.) USCOC was at the time and is now a wholly owned subsidiary of United States Cellular Corporation ("USCC"). (Supp. Rec. 211,

213, 226.) In turn, USCC was at the time and is now controlled by Telephone and Data Systems, Inc. ("TDS"); TDS owns 100 percent of that class of USCC's common stock which is entitled to elect five of USCC's seven directors. (Supp. Rec. 213, 224.)

In July 1993, USCOC filed an application with the FCC to transfer its interest (100 percent by this date) in Illinois 01 Partners to USCOC of Illinois RSA #1, Inc., which is a Virginia corporation and a wholly owned subsidiary of USCOC. (Supp. Rec. 214-215, 218.) TDS's recent annual report indicates that this application was granted. (Supp. Rec. 185.)

Further, TDS has a significant ownership interest in both respondents. Another subsidiary of TDS, through USCC, is United States Cellular Investment Company of Rockford ("USCIC Rockford") (Supp. Rec. 192.), which owns forty-nine percent of Central Cellular Telephones, Ltd. (C. 9), and forty percent of Leaf River Valley Cellular Telephone Co. (C. 130.)

Leaf River filed its complaint on May 24, 1994. (C. 122.) Central Cellular filed its complaint on May 25, 1994. (C. 1.) On June 24, 1994, Contel filed a motion to consolidate the two cases (C. 24-26), which the circuit court granted on June 29, 1994. (C. 27.)

The complaints both allege that Contel, as General Partner, was deemed to have filed an application in the lottery held by the FCC in the name of the Rockford MSA Partnership pursuant to paragraph 8.8 of the

Rockford Partnership Agreement. (A - 26, A - 38.) Because Contel did not transfer that application for Illinois RSA 1 to the Rockford MSA Partnership, Leaf River claims that Contel breached the partnership agreement and its fiduciary duty. (C. 8-12, 129-33.)

Respondents alleged that Contel "usurped" their "rights to provide cellular service in a neighboring area in Illinois." (A - 20, A - 32) Respondents also contend that petitioners "have seized unto themselves the profits to which the Partnership is entitled," (A - 21, A - 33) and "refus[ed] to share the fruits and benefits . . . and particularly to share the rights they have . . . gained to provide cellular service in Illinois RSA 1 . . . ." (A - 26, A - 38-39.)

Respondents further state in the complaints that they have not been and are not currently receiving their "proportionate share of the income" that is "generated by the cellular system in Illinois RSA 1, that properly belong[s] to the Partnership . . . ." (A - 26-27, A -39.) For their relief, respondents request that they receive "an accounting of revenues generated by the cellular system in Illinois RSA 1 and profits earned therefrom by defendants" and "an injunction requiring defendants to share with the Partnership any and all benefits" to defendants' interest in Illinois RSA 1. (A - 27, A - 39.)

REASONS FOR GRANTING THE WRIT

This case raises an important question of constitutional law under the Supremacy Clause that warrants this Court granting review. The question presented draws into issue the relationship between state common law and the federal law of telecommunications as prescribed by Congress and the FCC. The assumption of jurisdiction by the state court undermines Sections 310 and 332 of the Communications Act. The state court relied heavily upon Section 414 of the Act. The relationship between Sections 310, 332 and 414 raise profound questions that should be addressed by this Court as to who should establish telecommunications policy.

(1). FCC Prohibition Against Cross-Block Ownership Precludes the State Court From Granting Relief.

Leaf River and Central Cellular have requested in their complaints that they be permitted to share control over the Illinois RSA 1 cellular system. However, if the state court were to grant the requested relief, it would do so in violation of federal law prohibiting the same or related entities having an interest, directly or indirectly, in both licenses in the same market.

The FCC issues two cellular licenses per market, known as the "Block A" license and the "Block B"

license.[4] The FCC prohibits, with limited exceptions not applicable here, ownership interests by a particular entity in both licenses in a given market. The FCC's regulation states that "[n]o person may have a direct or indirect ownership interest in licensees for both channel blocks in overlapping cellular geographic service areas ('CGSAs'), unless such interests pose no substantial threat to competition."[5] In addition, "[a] licensee, a person that owns a controlling interest in a licensee, or a person who actually controls a licensee" in either the Block A or Block B license may not own an ownership interest "in the licensee, a person that owns a controlling interest in a licensee, or a person that actually controls a license for the other frequency block in an overlapping CGSA."[6] The FCC's rule is designed to promote competition in the cellular industry, and to prevent cross-ownership of cellular competitors in the same market which would be deleterious to competition.[7]

Respondents improperly seek to share ownership in the cellular license in Block B of Illinois RSA 1 because they already own, *indirectly*, 100 percent of the

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[4]47 C.F.R. § 22.905.

[5]47 C.F.R. § 22.942.

[6]*Id.*

[7]*Amendment of Part 22 of the Commission's Rules*, 6 F.C.C.R. 6185, 6228 (1991). The FCC stated: "As we stated in the NPRM, in a service where only two cellular carriers are licensed per market, the licensee on one frequency block in a market should not own an interest in the other frequency block licensee in the same market."

Block A license in Illinois RSA 1. TDS owns 100 percent of the Block A license in Illinois RSA 1, through its 100 percent ownership of the voting stock of United States Cellular Corporation ("USCC"), which owns 100 percent of United States Cellular Operating Company of Illinois RSA #1, the licensee for the Block A license of Illinois RSA 1.

As the FCC's rule states, indirect ownership of one of the two cellular licenses in a market bars direct or indirect ownership in the other license in the same market.[8] Respondents' parent is the owner of the Block A license. Respondents are requesting that the state court grant them a measure of ownership over the Illinois RSA 1 Block B license. If the state court rules in respondents' favor, the state court will be doing so in violation of federal law, which prohibits respondents from holding an ownership interest in both licenses in Illinois RSA 1 simultaneously.[9] The purpose of the FCC regulation is the promotion of competition in the market. Ownership of both licenses in the same market is contrary to federal policy that existed well before the formal adoption of section 22.942.[10]

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[8]47 C.F.R. § 22.942.

[9]*See Id.*

[10]*In re Inquiry Into Use of Bands 825-845 MHz for Use of Cellular Communications Systems, Memorandum and Order on Reconsideration*, 89 F.C.C. 2d 58, 73 (1982) (recognizing FCC's longstanding policy of maintaining separate frequency block allocations in order to foster competition); *see also In re: Implementation of Sections 3(n) and 332*

In affirming state court jurisdiction, the appellate court relied heavily upon the saving clause for common law actions contained in the Communications Act.[11] However, as pointed out by this Court in *Morales v. Transworld Airlines,*[12] "a general `remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision . . . ."[13] Here the saving clause is being used to supersede FCC policy regarding dual ownership in the same market. That is in direct conflict with federal policy.[14] Because of the violation of FCC regulations and Section 310 of the Communications Act presented by respondents' prayers for relief, this is not a simple common law action in contract or tort that is preserved under Section 414. It is highly unlikely that the FCC would grant approval of a transfer that violates Section 22.942 of its regulations. The FCC has determined that permitting one entity to share in the ownership of both of the competing licenses in a market would not be in the public interest.[15] This results in a collision between FCC regulations and state law.

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of the Communications Act, Regulatory Treatment of Mobile Services, 8 F.C.C.R. 7988, 7999 (1993) *and* 9 F.C.C.R. 1411 (1994).

[11]47 U.S.C. § 414; (A-14).

[12]504 U.S. 374 (1992).

[13]*Id.* at 385.

[14]*See* 47 C.F.R. 22.942.

[15]*Amendment of Part 22 of the Commission's Rules,* 6 F.C.C.R. at 6228.

The Supremacy Clause of the Constitution states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."[16] The Supreme Court has interpreted the Supremacy Clause to mean that Congress, in accordance with its broad powers under the Commerce Clause of the Constitution, may override, or preempt, state law by passing federal legislation.[17] Federal agencies acting within the scope of their congressionally delegated authority may also preempt state law.[18]

Moreover, this Court has stated that preemption of state law occurs when a federal statute conflicts with state law, so that compliance with both laws is impossible. Congress also may preempt state law by issuing a comprehensive system of regulation, such that state law on the same subject would interfere with the objectives of Congress.[19] Each of these principles applies here.

Congress has expressly pre-empted the states in the Omnibus Budget Reconciliation Act ("OBR") where it

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[16]U.S. Const. art. VI, cl. 2.

[17]*California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987).

[18]*City of New York v. FCC*, 486 U.S. 57, 63-64 (1988).

[19]*California Fed. Sav. and Loan Ass'n*, 479 U.S. at 280-81.

excluded "entry" regulation of which licensing is a part.[20] The thrust of the OBR is a comprehensive system of regulation of cellular by the FCC. As the FCC stated in its *Second Report and Order* implementing the OBR, "we believe the actions we take in this order establish a symmetrical regulatory structure that will promote competition in the mobile services marketplace and will thus serve the interests of consumers while also benefiting the national economy."[21] Furthermore, the FCC cross-block ownership regulation is in direct conflict with state action in this case.

State court jurisdiction in this case stands as an obstacle to Congressional purpose. If respondents are granted the relief that they seek in this case, such relief will have the effect of substituting state policy for federal policy. That collision compels this Court to grant the writ to clarify the issue.[22] Dual regulation of cellular telecommunications by the states and the FCC has been extinguished by Congress, leaving the FCC as the paramount authority establishing cellular policy.

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[20]47 U.S.C. § 332(c); 107 Stat. 312. Congress in section 332(c)(3) specifically excluded state regulation of cellular where sections 152(b) and 221(b) of the act are involved, thereby limiting the holding of *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986).

[21]*In re: Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 F.C.C.R. 1411, 1418 (1994).

[22]*Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581-82 (1981); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

(2). The FCC's Exclusive Jurisdiction Over The Transfer Or Sharing of Control of a Federal Communications License Precludes the State From Granting Relief.

This Court has declared that the grant, transfer, and revocation of communications licenses is "within the exclusive jurisdiction" of the FCC.[23] Such activity by a state court constitutes an attempt to "control the conduct of parties before the Communications Commission," and once a state had done so, it has "reached . . . into matters that do not belong to it."[24]

Through the Communications Act, Congress provided that no license, or any rights conferred by the license, may be transferred to any person without FCC approval. Section 310(d) of the Act states in relevant part:

> No . . . station license, *or any rights thereunder*, shall be transferred, assigned, or disposed of *in any manner*, voluntarily or *involuntarily*, *directly or indirectly*, . . . to any person *except upon application to the Commission* and upon finding by the Commission that the public interest, convenience,

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[23]*See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127-28, 130 (1945).

[24]*Id.* at 131.

and necessity will be served thereby . . . .[25]

The FCC has promulgated regulations with language similar to the Act, requiring that transfers of control be approved by the FCC.[26]

Respondents' claims, although labelled breach of contract and breach of fiduciary duty, are a camouflaged attempt to share ownership and control of the Illinois RSA 1 cellular system. Respondents, in their complaints, alleged that Contel "usurped" their "rights to provide cellular service in a neighboring area in Illinois." (A - 20, A - 32.) Respondents claim that they have not been, and are not receiving, their "proportionate share of the income" that is "generated by the cellular system in Illinois RSA 1, that properly belong[s] to the Partnership . . . ." (A - 26-27, A - 39.) Respondents further request that Contel be ordered to provide "an accounting of revenues generated by the cellular system in Illinois RSA 1 and profits earned therefrom . . . ." (A - 27, A - 39.)

In the view of the FCC, the sharing of profits in a partnership constitutes an ownership interest in, and is an indicia of control over, a license.[27] "The right to share in the profits of a partnership is akin to an equity security which is generally regarded as entailing an ownership

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[25]47 U.S.C. § 310(d) (emphasis added).

[26]*See* 47 C.F.R. § 22.137.

[27]*Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963).

interest."[28] Receipt of monies and accounting of revenue from a communications system constitutes an indicia of control over the license. Only the FCC, through its approval process, may determine who participates in ownership of a license. Undisclosed partners owning five percent or more, unapproved by the FCC, violates FCC regulations. As stated previously, transfer of control of a license requires approval from the FCC.[29] This Court has held that a state court does not have jurisdiction to transfer control of a communications license from an FCC-approved licensee to a third party.[30]

The FCC's strong prohibitions against unapproved transfers of control present an insurmountable obstacle to the state court if it chooses to grant respondents' requested relief, namely, "an accounting of revenues generated by the cellular system in Illinois 1 and profits earned therefrom by [petitioners]." (A - 27, A - 39.) Not only would the state court violate the FCC's regulations, which require that the FCC make an independent determination of the public convenience and necessity of a transfer of control, but the state court would also act

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[28]*In re: Applications of Algreg Cellular Engineering, et al.*, 6 F.C.C.R. 2921 (Common Carr. Bur. 1991), *aff'd*, 9 F.C.C.R. 5098 (Rev. Bd. 1994) (appeal pending).

[29]*See* 47 U.S.C. § 310(d); 47 C.F.R. § 22.137; *Applications of Brian L. O'Neill*, 6 F.C.C.R. 2572, 2574-75 (1991) (forfeiture of $50,000 assessed by the FCC for transfer of control without FCC approval.)

[30]*Radio Station WOW*, 326 U.S. at 127-28.

wholly beyond its jurisdiction.

Although this Court has recognized the exclusivity of FCC jurisdiction over licensing, it has given some latitude to the state courts in *Radio Station WOW*[31] and *Regents of University System of Georgia v. Carroll*,[32] which now must be viewed against the dramatic changes that have occurred in the scope, size and complexity of telecommunications in this country since 1950. Congress has recognized and responded to these changes by expanding federal jurisdiction in amending the Communications Act in 1993 through the OBR. The need for nationwide uniformity in telecommunications regulation recognizes the fallibility of local intercession. The fracturing of jurisdiction over telecommunications policy to multiple decision makers is antithetical to a uniform national policy. Section 414 should not be interpreted to encourage that fracturing. Both *Radio Station WOW* and *Regents* involved local radio stations. In contrast, the instant case involves cellular telephone service which is part of the nationwide switched telephone network. Re-examination of principles enunciated in *Radio Station WOW* and *Regents* is needed to conform federal telecommunications law to today's environment and to achieve the Congressional objective of uniformity mandated by the OBR.

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[31]326 U.S. 120 (1945).

[32]338 U.S. 586 (1950).

This is not a garden variety contract or tort case. Respondents' requests for relief violate FCC policy and ask the state court to circumvent the requirements for obtaining FCC approval of matters clearly within the FCC's jurisdiction. Where a decision on a state law cause of action as a threshold matter requires an interpretation of federal licensing principles, the FCC has not ceded its decision making authority to the states.[33] Instead, the FCC has recognized that state laws applicable to such causes of action must yield when in conflict with federal policy.[34] Nor has this Court hesitated to pre-empt state court damages actions where the relief requested by a plaintiff would exceed that available under federal law or conflict with validly promulgated federal regulations.[35] If allowed to proceed, the state court could seriously undermine Section 310 of the Communications Act by substituting its judgment for that of the FCC as to ownership of the license and disrupt the FCC's licensing process.

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[33] *See In re: Clifford Heinz Stanton Trust*, 8 F.C.C.R. 973, 974 n.4 (Mobile Serv. Div. 1993) ("While it is proper for state courts to determine the existence of contractual agreements, the [FCC] ultimately must decide cross-ownership issues in accordance with its rules.")

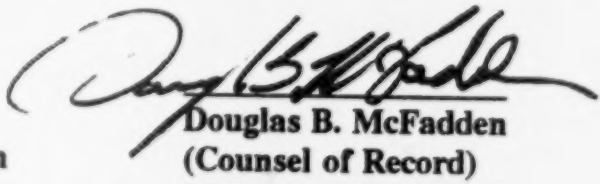
[34] *See Marlin Broadcasting of Central Florida, Inc. v. FCC*, 952 F.2d 507, 512 (D.C. Cir. 1992); *see also In re: Applications of Algreg Cellular Engineering*, 9 F.C.C.R. 5098, 5128 (Rev. Bd. 1994) (appeal pending).

[35] *Arkansas Louisiana Gas Co.*, 453 U.S. at 581-82; *see also City of New York v. FCC*, 486 U.S. 57 (1988) (local cable television technical standards pre-empted when in conflict with validly promulgated federal regulations).

CONCLUSION

Wherefore, petitioners, for the foregoing reasons, pray that this Court issue a writ of certiorari to review the decision of the Supreme Court of Illinois.

Respectfully submitted,



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A P P E N D I X

ΧΙΟΡΕΙΑ

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

LEAF RIVER VALLEY CELLULAR TELEPHONE CO., INC.,	)
Plaintiff,	)No. 94-CH-148)FILED)November 17, 1994
vs.	)CLERK,)RONALD KOTCHE
CONTEL CELLULAR, INC., a Delaware Corporation, and CONTEL CELLULAR OF ILLINOIS, INC., an Illinois Corporation,	)
Defendants,	)
and	)
ROCKFORD MSA LIMITED PARTNERSHIP, an Illinois Limited Partnership,	)
Nominal Defendant.	)

REPORT OF PROCEEDINGS from the decision rendered on the 12th day of October, 1994, before the HON. ALFORD R. PENNIMAN.

APPEARANCES:

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Attorney at Law

for the Plaintiff.

MR. JEFFERY M. CROSS
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for the Defendant.

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PROCEEDINGS

THE COURT: Well, just have a seat and I'll give you the grand decision This is 94-CH-148, Leaf River Valley Cellular Telephone Company, Inc. versus Contel Cellular, et al. And this comes on for ruling on the defendant's motion to dismiss. And their motion was filed on June 30th, 1994; motion was argued; and now I'll give you the decision.

The motion actually breaks up into three parts. The first part is what you might call preemption. And the argument made in the motion is that the federal law

preempts and, therefore, the case should not be heard in this court, et cetera and so forth.

Now, along that line we need to consult with two authorities. First authority is Centel Corporation and Sprint Corporation, and this is a written opinion in the Federal Communications Commission. It's in there, and it's cited at 8 FCC, says, Red Number Six, and it appears on Page 1829 of the Commission record. Introduction-- and this is released March 4th, 1993.

Introduction reads, "In this order we address applications filed jointly by Sprint Corporation, called "Sprint," and Centel Corporation, called "Centel," that seek the Commission's consent to transfer control to Sprint of common carrier radio authorizations held by Centel subsidiaries and affiliates. For reasons discussed below we grant the applications.

Background. On May 27th, 1992, Centel and Sprint entered into agreement and plan of merger to merge their companies through an exchange of stock valued at 2.85 billion. Thereafter on August 31st, 1992, the applications here before us were filed pursuant to Section 310(d) of the Communications Act of 1934, as amended. Under the proposed transaction Centel would become a wholly-owned subsidiary of Sprint. The merged company would have assets of 14 billion and estimated initial annual revenues of 10 billion."

Turning to Page 1831 in the Commission decision, continues this way. "Orwell contends that the applications for the proposed transfers of control should be denied because applicant's decision to merge violates the partnership agreements to which Orwell and a subsidiary

of Centel, TeleSpectrum, are signatories, and because Sprint has failed to demonstrate that it has the financial resources to operate the subject facilities for one year.

"Alternatively, if the applications are granted, Orwell requests that Sprint be required to maintain separate books of account for cellular and other operations in order to prevent it from improperly cross-subsidizing its rate regulated and other business activities, e.g., cellular telephone systems.

"Orwell's arguments are unavailing. First, the alleged violation of the partnership agreements amounts to a contractual dispute between Orwell and Centel, and therefore, a matter for resolution by a private cause of action, rather than resolution by the Commission. The Commission has repeatedly stated that it is not the proper forum for the resolution of private contractual disputes, noting that these matters are appropriately left to the courts or to other fora that have the jurisdiction to resolve them."

In addition, we have the decision of the Illinois Supreme Court in Kellerman versus MCI Telecommunications, cited at 112 Ill.2d 428 at page 443--starting at 443 anyway. The supreme court--Illinois Supreme Court says, quote, "We think the better view is that plaintiff's actions are not preempted by the Act. The subject matter of plaintiff's complaints involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates. Plaintiffs only allege that defendant disseminated fraudulent and deceptive advertisements concerning the cost of its long-distance telephone service.

"As such, plaintiffs seek to hold defendant to the same standards as they would any other business which advertises on a nationwide basis and which, in the course of its business, is subject to regulation from a number of federal and state agencies. Moreover, these actions do not present an obstacle to the accomplishment of the federal policy of promoting a rapid, efficient communication service with adequate facilities at reasonable charges. The prosecution of these claims will in no way interfere with the delivery of long-distance telephone service to defendant's customers, and any possible effect the litigation could have on defendant's telephone rates is speculative at best."

Alternatively--well, okay. "Finally, no federal statute or regulation has been brought to our attention which would expressly prohibit these actions. Therefore, we find that congress did not intend to occupy the field of interstate telephone service to the extent of barring these state-law claims for fraud, breach of contract, and deceptive practices, and hold that plaintiffs' actions are not preempted."

"Alternatively, defendant argues that the doctrine of primary jurisdiction requires these actions to be stayed pending review of the claims by the FCC. The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. The doctrine provides that even when a court has jurisdiction over a matter, it should in some instances stay the judicial proceedings pending referral of the controversy, or a portion of it, to the administrative agency having expertise in the area."

There were many other cases and authorities cited, but I believe these are the two primary ones. The issue here is whether or not the lawsuit itself, Counts One and Two, is preempted; or, if it's not preempted, that basically the doctrine of primary jurisdiction should apply.

For the reasons stated in the FCC opinion, this is a matter that the FCC refers to the court of proper jurisdiction to resolve if it was a matter of enforcing the partnership contract. And, of course, that's what Counts One and Two are. Basically, the allegation is brought for the purpose of enforcing the alleged partnership agreement. Also, as is indicted in the FCC opinion, we do not apply the doctrine of primary jurisdiction because these are matters that are not resolved by the FCC.

So the first part of the motion to dismiss, preemption and primary jurisdiction, is heard and denied.

Second part. We discuss this other action pending in DeKalb County. It does not involve the same parties, does not involve the same transaction, and therefore 619-(a) (3) does not apply in this situation. Therefore, on that grounds the motion to dismiss is heard and denied.

Third and last issue which applies to Count Two of the complaint basically is the statute of limitations question of five years. The defendant claims the action accrued when the application was filed for the other territory in 1988. Of course this is at the time of the original filing and this is before the lottery drawing for the license. And they say that's when the statute should begin to run; and, therefore, since they filed in May of '94, they'd be barred.

The defendant was authorized to file for the license issues in the this lawsuit, but this lawsuit raises the point and it's brought because of defendant's alleged failure to share the profits from the other license operation, RSA 1, and it's not brought because of the filing of the application for a license or even the granting of the license in that actual sense.

Now, the critical exhibit here--and I've read through all the exhibits and all the briefs, and I must comment that this case is extremely well prepared and very good briefs written. What we get down to--and I've read through all the letters in sequence.

We get down to this letter of August 31st, 1989, signed by Laura E. Binion, corporation counsel for Contel. And this apparently was from corporate headquarters, Atlanta, Georgia. And I'm just going to read a couple of sentences out of her letter on the second page. This is actually a whole series of correspondence between Leaf River and Contel Cellular.

Quote, "If Contel and Leaf River Rural have not agreed upon terms of the partnership agreement by that time, Contel will have no choice under current FCC regulations but to request that the FCC issue the construction permit in Contel's name as lottery winner of this RSA. Contel's contractual obligations at that time will have to be worked out by all the parties."

And then here comes the punch line. Quote, "With respect to the letter received from Leaf River Cellular," which is the party in this case, "Contel does not believe it has any obligation to request that the FCC issue the license for the Illinois RSA 1 to the Rockford Partnership

and will not request the FCC to do so. I will be happy to discuss these matters with you at your convenience. Sincerely," signed Laura Binion, corporate counsel.

In the opinion of this court that is when the statute of limitations time began and that's when the cause of action accrued, is when the plaintiff here was advised by the defendant that no way was this license going to be for the benefit of the Rockford partnership, but would be the property of Contel Cellular itself, which, of course, is what this whole cause of action is about.

Therefore, I find that that, under what's been presented so far anyway, is when the statute of limitations would begin to run, August 31st, 1989. Since this action was filed in, I believe, May of '94, the filing was timely. Therefore, for that reason motion to dismiss is heard and denied.

However, since this is a 619 motion, it's 619-(a)(5), I will allow, if the defendant so wishes, the defendant to plead over just as an affirmative defense in their pleadings. And they can do that within 21 days.

Otherwise, in summary, motion to dismiss heard and denied.

Any questions?

See order.

MS. ROACH: Your Honor, in the preparatory remarks to your decision you indicated that it related to the lawsuit brought by Leaf River against Contel. There's actually a companion case.

THE COURT: Well, I was referring to both--

MS. ROACH: Okay.

THE COURT: --at the same time.

MS. ROACH: Okay.

THE COURT: I've actually consolidated these two cases for the purpose of these procedures. And, therefore, when I speak of one, I speak of the other.

THIS ORDER IS NOT PRECEDENTIAL
AND IS NOT TO BE CITED

No. 2-94-1303

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LEAF RIVER VALLEY CELLULAR TELEPHONE CO., INC.,	)Appeal from the Circuit)Court of Winnebago County)))
Plaintiff-Appellee,	)No. 94-CH-148)No. 94-CH-151)
v.	))
CONTEL CELLULAR INC. AND CONTEL CELLULAR OF ILLINOIS,	))))Filed)March 21 1995
Defendants-Appellants,	)LOREN J. STROTZ,)CLERK)APPELLATE COURT
and	)2nd DISTRICT)
ROCKFORD MSA LIMITED PARTNERSHIP,	))))

Nominal Defendant.	)
	)
CENTRAL CELLULAR TELEPHONES, LTD.,	)
Plaintiff-Appellee,	)
CONTEL CELLULAR INC. and CONTEL CELLULAR OF ILLINOIS,	)
Defendants-Appellants,	)
and	)
ROCKFORD MSA LIMITED PARTNERSHIP,	)
Nominal Defendant.	)Honorable)Alford R. Penniman,)Judge, Presiding.

No. 2-94-1303

RULE 23 ORDER

The FCC has divided the nation into service areas for the purpose of regulating the provision of cellular phone service. Urban areas are called MSAs

(Metropolitan Service Areas), and non-urban areas are called RSAs (Rural Service Areas). The FCC issues two licenses, a Block A license and a Block B license, in each service area and prohibits a single entity from having control of both licenses in a single area.

Defendants, Contel Cellular Inc. and Contel Cellular of Illinois, bring the present interlocutory appeal from the order of the circuit court of Winnebago County denying their motions to dismiss for lack of subject matter jurisdiction and to stay the circuit court proceedings, pending action before the Federal Communications Commission (FCC). We affirm.

The parties are corporations and partnerships engaged in, among other things, providing cellular phone service in the vicinity of Rockford, Illinois. Plaintiffs, Leaf River Valley Cellular Telephone Company (owned by Leaf River Telephone Co. and United States Cellular Investment Company of Rockford) and Central Cellular Telephones, Inc., are limited partners in Rockford MSA Limited Partnership (RMSA, the nominal defendant). RMSA holds a Block B license to provide cellular service in the Rockford metropolitan service area.

Defendant Contel Cellular, Inc. (which now owns all interest in RMSA previously owned by defendant Contel Cellular of Illinois, Inc.) is both a limited partner and the general partner in RMSA. Ameritech Mobile Communications, Inc. (a non-party) is also a limited partner in RMSA.

Defendants are also the general partner in Illinois RSA 1 Limited Partnership (IRSA). IRSA applied for

and obtained a Block B license to serve rural northwest Illinois. Plaintiffs sued defendant (in separate suits consolidated by the trial court), alleging that the action of obtaining the rural Block B license through IRSA constituted a breach of contract and a breach of defendant's fiduciary duty to them.

Defendants moved for dismissal for lack of subject matter jurisdiction, claiming that federal law preempted a decision by a state court. Defendants also moved to stay the circuit court action, pending a decision by the FCC. The trial court denied these motions, and defendants appeal.

Appeal from the denial of the motion to stay the proceedings is permitted pursuant to Supreme Court Rule 307(a)(1). (Official Reports Advance Sheet No. 26 (December 22, 1993), R. 307(a)(1), eff. Feb. 1, 1994; see also Metropolitan Sanitary District v. United States Steel Corp. (1975), 30 Ill. App. 3d 360, 361). Interlocutory appeal on the issue of preemption is permitted if the issue is certified to the appellate court by the trial court. (Supreme Court Rule 308 (Official Reports Advance Sheet No. 26 (December 22, 1993), R. 308, eff. Feb. 1, 1994).) The trial court did not rule on defendants' Rule 308 motion prior to this appeal. However, because the preemption argument challenges the court's jurisdiction to deny the stay, we will address that issue notwithstanding the noncompliance with Rule 308. See Kellerman v. MCI Telecommunications Corp. (1986), 112 Ill. 2d 428.

Defendants contend that the trial court erred in finding that plaintiffs' claims are not preempted by the Communications Act of 1934 (47 U.S.C.A. § 301, et seq. (1991)) and the Omnibus Budget Reconciliation Act of

1993 (OBRA) (P.L. 103-66 (August 10, 1993)). Preemption of state action by federal law can occur under three circumstances: (1) Congress can expressly preempt state action by stating the intent to preempt in the language of a federal enactment; (2) congressional intent to preempt state action may be inferred where the scheme of federal regulation is sufficiently comprehensive; and (3) where state and federal law conflicts in an area regulated by federal law, the state action will be nullified. (Hillsborough County v. Automated Medical Laboratories, Inc. (1985), 471 U.S. 707, 713, 85 L. Ed. 2d 714, 721, 105 S. Ct. 2371, 2375.) Federal law will preempt state law only where a court finds that preemption was "the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp. (1947), 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152.

Defendants claim that all three circumstances are present in this case, so that this action is preempted be federal law. The Communications Act does not expressly preempt state action. The Act provides that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (47 U.S.C.A. § 414 (1991).) This language does not support an inference of preemption. See Kellerman, 112 Ill. 2d at 443.

Defendants argue that a decision by the trial court in this dispute would conflict with federal law, and therefore federal law preempts the matter in dispute. Defendants argue that in order to resolve this dispute, the court might have to transfer to plaintiffs control of the license at issue. A state court does not have jurisdiction to transfer control of a communications license from an

FCC -approved licensee to a third party. (Radio Station WOW v. Johnson (1945), 326 U.S. 120, 127-28, 89 L. Ed. 2092, 2099, 65 S. Ct. 1475, 1480.) Plaintiffs, however, have not asked the trial court to transfer control of the license. They seek only compensatory damages from defendants for their offenses as general partners, specifically (1) seizing a partnership opportunity for themselves and (2) breach of the provision of the partnership agreement which requires that if the general partner applies for a license to serve another service area, the application shall be on behalf of the partnership. No decision on either of these issues would require the trial court to tread on FCC powers or responsibilities.

Defendants allege that plaintiffs seek an ownership interest in the Block B license defendants obtained for Illinois RSA #1. They assert that by granting such an interest the trial court would cause a violation of 47 C.F.R. § 22.902(b)(5) (1994), a regulation that prohibits direct or indirect ownership by a single entity of both the Block A and the Block B licenses in one service area. Defendants argue that indirect ownership of both licenses in Illinois RSA #1 would occur if plaintiffs succeed in this case, because United Stated Cellular Investment Company of Rockford, a company that owns 49% of plaintiff Leaf River Valley and 40% of plaintiff Central Cellular, is entirely owned by United States Cellular Corporation, a company that owns the Block A license in Illinois RSA #1 through a subsidiary. If plaintiffs win control of the Block B license, defendants argue, then United States Cellular Corporation would indirectly control both licenses in Illinois RSA #1.

Plaintiffs maintain that they seek neither an ownership interest in nor control over, the Block B

license. They want only the damages for which they have sued.

Defendants assert that plaintiffs really do want an ownership interest, but they sued for damages because they know they could not lawfully obtain an ownership interest in the license. Defendants also contend that damages paid out of the profits from the license would comprise an ownership interest. Defendants assert that the sharing of profits in a partnership an the receipt of an accounting of revenue (the relief specifically sought in the complaint) constitute an ownership interest in a partnership.

The right to share in profits is generally considered an indicia of control. (See Greil v. Travelodge International, Inc. (1989), 186 Ill. App. 3d 1061, 1068.) This rule pertains to whether plaintiffs are entitled to the relief sought, not to whether the court has jurisdiction to hear the matter. Any of these arguments might be posed as affirmative defenses to the relief sought, but they do not present impediments to the trial court's jurisdiction. There is no actual conflict between the Communications Act and the action brought by plaintiffs.

Defendants have cited no express preemption of the present action in OBRA; nor has our research revealed such language. Defendants cite to 47 U.S.C.A. § 332(C)(3)(A) (Supp. 1994), a section of OBRA that prohibits state regulation of "the entry of or the rates charged by any commercial mobile service ***." (47 U.S.C. § 332(c)(3)(A) (Supp. 1994).) As that section of OBRA is totally irrelevant to the substance of the present case, we must assume that defendant infers total preemption of state action from this language.

We do not agree with that interpretation. Nothing in OBRA expressly or impliedly preempts the adjudication of the claims brought by plaintiffs. Nor did we find any conflict between OBRA and the possible results of this litigation.

The FCC has repeatedly refused to rule on private contractual disputes, deferring these matters to resolution in the courts. (In re Applications of Decatur Telecasting, Inc. (1992), 7 F.C.C.R. 8622, ¶ 12; In re Applications of Wind N' Sea FM Limited Partnership (1992), 7 F.C.C.R. 2293, 2294, n.5; In re Applications of KQED, Inc. (1991), 6 F.C.C.R. 625, ¶ 13.) Despite the fact that plaintiffs may not be entitled to the relief they seek, they are nevertheless entitled to litigate the matter in a court of law. The trial court clearly has jurisdiction to hear these matters, and it therefore properly denied defendants' motion to dismiss.

Defendants' final contention, that the trial court erred in denying the motion to stay proceedings pending a decision by the FCC, is meritless. As noted above, the FCC does not adjudicate private contract disputes. (Wind N' Sea, 7 F.C.C.R. at 2294, n.5.) Furthermore, there is no action pending before the FCC in this matter.

For the foregoing reasons, we affirm the order of the circuit court of Winnebago County denying defendants' motions to dismiss and to stay.

Affirmed.

INGLIS, J., with GEIGER and HUTCHINSON, JJ., concurring.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
(217) 782-2035

October 4, 1995

Mr. Peter E. Carlson
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No. 79010 - Leaf River Valley Cellular Telephone Co., Inc., et al., respondents, v. Contel Cellular Inc., et al., petitioners. Leave to appeal. Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 26, 1995.

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL COURT OF ILLINOIS, WINNEBAGO COUNTY

LEAF RIVER VALLEY CELLULAR TELEPHONE CO., INC.	))RECEIVED)MAY 26 1994)FILED
Plaintiff,	)MAY 24 1994)RONALD KOTCHE
vs.	)Clerk of the)Circuit Court
CONTEL CELLULAR, INC., a Delaware corporation, and CONTEL CELLULAR OF ILLINOIS, INC., an Illinois corporation,	)WINNEBAGO COUNTY,)ILLINOIS)))No. 94-CH-148)
Defendants,	)
and	)
ROCKFORD MSA LIMITED PARTNERSHIP, an Illinois Limited Partnership,	)
Nominal Defendant.	)

COMPLAINT

Plaintiff Leaf River Valley Cellular Telephone Co.,

Inc. ("Leaf River"), by its attorneys, states as follows for its complaint against Contel Cellular, Inc. ("Contel") and Contel Cellular of Illinois, Inc. ("Contel of Illinois" or the "General Partner"):

NATURE OF THE ACTION

1. Plaintiff Leaf River brings this action to obtain relief for actions taken by defendants in violation of their contractual and fiduciary duties to the Rockford MSA Limited Partnership (the "Partnership") and the limited partners therein. Leaf River is a limited partner and Contel, through its wholly-owned subsidiary Contel of Illinois, is the general partner of the Partnership. The Partnership provides cellular telecommunications service in Rockford, Illinois and the surrounding area. Defendants have usurped for themselves the rights to provide cellular service in a neighboring area in Illinois, without sharing those opportunities with the Partnership, in violation of the partnership agreement and their fiduciary obligations.

2. This action is brought individually by the plaintiff and as a derivative action pursuant to 805 ILCS 210/1101.

3. Leaf River has been a limited partner at all times relevant to the matters complained of herein.

4. Any effort to cause the General Partner to bring this action would be futile and not likely to succeed. This action alleges breaches of the partnership agreement and of fiduciary duties by Contel of Illinois, the sole General Partner of the Partnership, and by the General Partner's sole shareholder, Contel. These defendants'

unlawful actions have financially benefitted Contel. Specifically, Contel and Contel of Illinois have obtained the permit and license to construct and operate a cellular telephone system that adjoins the Rockford MSA. Contel and Contel of Illinois have operated and continue to operate this system for their own benefit and have financially profited from the operation of this systems. The rights to own and operate this system and reap the financial rewards thereof belong to the Partnership. Demand has been made on Contel to honor its obligations to the Partnership, but it has refused to do so. Indeed, Defendants have continued to wrongfully deprive the Partnership of those rights and have seized unto themselves the profits to which the Partnership is entitled. Contel thereby has a substantial financial interest with respect to the actions complained of herein. Similarly, Contel of Illinois, like its parent, is neither financially disinterested nor independent with respect to the transactions challenged in the complaint. For these reasons, any further effort to cause the General Partner to bring this action would be futile and not likely to succeed.

PARTIES AND JURISDICTION

5. Leaf River is a corporation organized under the laws of the State of Illinois. Leaf River is engaged in the business of, inter alia, owning a limited partnership interest in a cellular telecommunications system in Rockford, Illinois.

6. Contel is a corporation incorporated under the laws of the State of Delaware, with its principal place of business in Atlanta, Georgia. Among other business activities, Contel is engaged in the business of providing

cellular, telecommunications service.

7. Contel of Illinois is a corporation incorporated under the laws of the State of Illinois, with its principal place of business in Sycamore, Illinois. Contel of Illinois is engaged in the business of owning and operating a cellular telecommunications system in Rockford, Illinois.

8. Venue is proper in this County pursuant to Ill. Rev. State. ch. 110, ¶¶ 2-101 and 2-102 since defendant is doing business in this County.

BACKGROUND

9. The Federal Communications Commission ("FCC") regulates the cellular telecommunications industry in the United States. As one aspect of that regulation, the FCC has divided the United States into defined geographic service areas or markets for purposes of providing cellular telephone service to the public. The more urban areas served are called Metropolitan Statistical Areas ("MSAs"), while the more rural areas are called Rural Service Areas ("RSAs"). Each MSA is typically surrounded by and adjoins several RSAs.

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company ("non-wireline operator"), selecting among those entities submitting applications for that particular area.

CELLULAR SERVICE IN THE ROCKFORD MSA

11. The Rockford, Illinois cellular service area has been designated by the FCC as an MSA (the "Rockford MSA"). Several RSAs adjoin the Rockford MSA, including Illinois RSA 1.

12. On or about May 27, 1986, the Rockford MSA Limited Partnership (the "Partnership") was formed and a limited partnership agreement was executed (the "Partnership Agreement") by Contel, Leaf River, Ameritech Mobile Communications, Inc. ("Ameritech") and Central Cellular Telephones, Ltd. ("Central Cellular"). The partnership was formed for the purpose of funding, establishing and providing cellular telecommunications service in and around Rockford, Illinois.

13. On or about January 30, 1987, the Partnership received the FCC permit to construct a cellular system in the Rockford MSA. On or about November 5, 1987, the Partnership received the FCC license to operate a cellular system in the Rockford MSA.

14. The Partnership is a limited partnership organized under the laws of the State of Illinois, in which Contel of Illinois is the General Partner and a limited partner, holding a 35% general partnership interest and a 24% limited partnership interest (Contel transferred its interest in the Partnership to Contel of Illinois on or after July 9, 1987), Central Cellular is a limited partner, holding a 20% limited partnership interest, Leaf River is a limited

partner, holding a 20% limited partnership interest, and Ameritech is a limited partner, holding a 1% limited partnership interest.

15. Although Contel of Illinois is nominally the General Partner of the Partnership, its parent Contel executed the Partnership Agreement and at all times pertinent hereto has retained ultimate control of the Partnership. Contel therefore has certain contractual and fiduciary obligations to the Partnership and its limited partners.

CELLULAR SERVICE IN ADJOINING AREAS

16. Pursuant to Section 8.8 of the Partnership Agreement, any application by Contel or an affiliate thereof to provide cellular service in areas adjoining the Rockford MSA is to be made on behalf of the Partnership. Section 8.8 of the Partnership Agreement provides in pertinent part as follows:

> 8.8 Cellular Service in Other Areas.
> . . . Applications by the General Partner or an Affiliate thereof to provide Cellular Service in areas adjoining the MSA shall be deemed to be made on behalf of the Partnership pursuant to the terms of Section 7.2(f).

17. Section 7.2(f) of the Partnership Agreement vests Contel of Illinois with the power to make on behalf of the Partnership applications to provide cellular service in areas adjoining the Rockford MSA.

18. Contel made an application to provide, and

its affiliate Contel of Illinois, is providing, cellular service in an RSA which adjoins the Rockford MSA, but they have refused and continue to refuse, despite repeated demands made on behalf of the plaintiff, to acknowledge that Contel's application should have been made on behalf of the Partnership.

19. On or about September 21-23, 1988, Contel filed an application with the FCC to obtain an authorization to construct and license to operate a cellular telecommunications system in Illinois RSA 1, which adjoins the Rockford MSA. Contel filed this application on its own behalf. Under the plain language of the Partnership Agreement, however, this application should have been made on behalf of the Partnership.

20. On or about May 26, 1989, the FCC announced that Contel was the winning applicant for the Illinois RSA 1 service area. Upon information and belief, shortly thereafter, Contel formed the Illinois RSA 1 Limited Partnership, of which Contel was (and Contel of Illinois now is) the General Partner, holding a 91.5% ownership interest, for the purpose of providing cellular service in Illinois RSA 1.

21. On or about September 17, 1990, Illinois RSA 1 Limited Partnership received the FCC permit to construct a cellular system in Illinois RSA 1. On or about October 9, 1990, Illinois RSA 1 Limited Partnership received the FCC license to operate a cellular system in Illinois RSA 1.

22. On or about November 19, 1990, Contel filed an application with the FCC to transfer its interest in Illinois RSA 1 to Contel of Illinois, which was granted on

December 5, 1990.

COUNT I - BREACH OF PARTNERSHIP AGREEMENT

1-22. Plaintiff realleges and incorporates by reference herein paragraphs 1-22 above as paragraphs 1-22 of this Count I.

23. Under Section 8.8 of the Partnership Agreement, Contel's application to provide cellular service in Illinois RSA 1 should have been made on behalf of the Partnership, because Illinois RSA 1 is an area adjoining the Rockford MSA.

24. Despite repeated demands by United States Cellular Investment Company of Rockford ("USCIC Rockford"), which owns a 40% interest in Leaf River, Contel and Contel of Illinois have willfully failed and refused to acknowledge that Contel's application to provide cellular service in Illinois RSA 1 should have been made on behalf of the Partnership or to share the benefits of the rights they ultimately received, through approval of that application, to provide cellular service in Illinois RSA 1 with the Partnership.

25. By refusing to acknowledge that Contel's application to provide cellular service in Illinois RSA 1 should have been made on behalf of the Partnership, and by refusing to share the fruits and benefits of that application with the Partnership, and particularly to share the rights they have thereby gained to provide cellular service in Illinois RSA 1, Contel and Contel of Illinois have breached the Partnership Agreement.

26. Leaf River has been and continues to be damaged by Contel's and Contel of Illinois' breach of the Partnership Agreement, in that it has not been and is not receiving its proportionate share of the income and business opportunities generated by the cellular system in Illinois RSA 1, that properly belong to the Partnership but that have been usurped by Contel and Contel of Illinois for themselves alone.

WHEREFORE, plaintiff Leaf River request that the Court enter judgment in favor of Leaf River and against defendants, and award the following relief:

a. an accounting of revenues generated by the cellular system in Illinois RSA 1 and profits earned therefrom by defendants;

b. an injunction requiring defendants to share with the Partnership any and all benefits attributable to defendants' interest in Illinois RSA 1;

c. compensatory damages in an amount to be determined at trial;

d. reasonable expenses, including reasonable attorney's fees as provided by 805 ILCS 210/1004; and

e. such other and further relief as the Court deems just and appropriate.

COUNT II - BREACH OF FIDUCIARY DUTY

1-26. Plaintiff realleges and incorporates by reference herein paragraphs 1-26 of Count I as paragraphs 1-26 of this Count II.

27. Contel and Contel of Illinois, by virtue of their status and actions as General Partner and holder of the majority interest in the Partnership, owe a duty of loyalty and other fiduciary duties to Leaf River and the Partnership.

28. The opportunity to provide cellular service in Illinois RSA 1 was an opportunity belonging to the Partnership, but was usurped by defendants for themselves alone.

29. Despite repeated demands by USCIC Rockford, defendants have willfully failed and refused to share their right to provide cellular service in Illinois RSA 1 with the Partnership.

30. In making an application to provide cellular service in Illinois RSA 1 solely on their own behalf, and retaining the rights obtained solely for their own benefit and refusing to share them with the Partnership or its limited partners, defendants acted in bad faith.

31. By usurping for themselves the valuable right to provide cellular service in Illinois RSA 1, defendants have breached their fiduciary duties to the

Partnership and plaintiff Leaf River.

WHEREFORE, plaintiff Leaf River requests that the Court enter judgment in favor of Leaf River and against defendants, and award the following relief:

a. an accounting of revenues generated by the cellular system in Illinois RSA 1 and profits earned therefrom by defendants;

b. an injunction requiring defendants to share with the Partnership any and all benefits attributable to defendants' interest in Illinois RSA 1;

c. compensatory damages in an amount to be determined at trial;

d. reasonable expenses, including reasonable attorney's fees, as provided by 810 ILCS 210/1004;

e. punitive damages in an amount to be determined at trial; and

f. such other and further relief as the Court deems just and appropriate.

Plaintiff demands trial by jury on all counts.

Respectfully submitted,

By: /s/ Steven W. Young
Attorneys for Leaf River
Valley Telephone Co., Inc.

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Kathleen L. Roach
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(312) 853-7000

**IN THE CIRCUIT COURT OF
THE SEVENTEENTH JUDICIAL COURT
OF ILLINOIS, WINNEBAGO COUNTY**

CENTRAL CELLULAR TELEPHONES, LTD., an Illinois corporation,	)
Plaintiff,	)FILED)MAY 25 1994)RONALD KOTCHE
vs.	)Clerk of the)Circuit Court
CONTEL CELLULAR, INC., a Delaware corporation, and CONTEL CELLULAR OF ILLINOIS, INC., an Illinois corporation,	)WINNEBAGO COUNTY,)ILLINOIS)))No. 94-CH-151
Defendants,	)
and	)
ROCKFORD MSA LIMITED PARTNERSHIP, an Illinois Limited Partnership,	)
Nominal Defendant.	)

COMPLAINT

Plaintiff Central Cellular Telephones, Ltd. ("Central Cellular"), by its attorneys, states as follows for its complaint against Contel Cellular, Inc. ("Contel") and Contel Cellular of Illinois, Inc. ("Contel of Illinois" or the "General Partner"):

NATURE OF THE ACTION

1. Plaintiff Central Cellular brings this action to obtain relief for actions taken by defendants in violation of their contractual and fiduciary duties to the Rockford MSA Limited Partnership (the "Partnership") and the limited partners therein. Central Cellular is a limited partner and Contel, through its wholly-owned subsidiary Contel of Illinois, is the general partner of the Partnership. The Partnership provides cellular telecommunications service in Rockford, Illinois and the surrounding area. Defendants have usurped for themselves the rights to provide cellular service in a neighboring area in Illinois, without sharing those opportunities with the Partnership, in violation of the partnership agreement and their fiduciary obligations.

2. This action is brought individually by the plaintiff and as a derivative action pursuant to 805 ILCS 210/1101.

3. Central Cellular has been a limited partner at all times relevant to the matters complained of herein.

4. Any effort to cause the General Partner to bring this action would be futile and not likely to succeed.

This action alleges breaches of the partnership agreement and of fiduciary duties by Contel of Illinois, the sole General Partner of the Partnership, and by the General Partner's sole shareholder, Contel. These defendants' unlawful actions have financially benefitted Contel. Specifically, Contel and Contel of Illinois have obtained the permit and license to construct and operate a cellular telephone system that adjoins the Rockford MSA. Contel and Contel of Illinois have operated and continue to operate this system for their own benefit and have financially profited from the operation of this systems. The rights to own and operate this system and reap the financial rewards thereof belong to the Partnership. Demand has been made on Contel to honor its obligations to the Partnership, but it has refused to do so. Indeed, Defendants have continued to wrongfully deprive the Partnership of those rights and have seized unto themselves the profits to which the Partnership is entitled. Contel thereby has a substantial financial interest with respect to the actions complained of herein. Similarly, Contel of Illinois, like its parent, is neither financially disinterested nor independent with respect to the transactions challenged in the complaint. For these reasons, any further effort to cause the General Partner to bring this action would be futile and not likely to succeed.

PARTIES AND JURISDICTION

5. Central Cellular is a corporation organized under the laws of the State of Illinois. Central Cellular is engaged in the business of, inter alia, owning a limited partnership interest in a cellular telecommunications system in Rockford, Illinois.

6. Contel is a corporation incorporated under the laws of the State of Delaware, with its principal place of business in Atlanta, Georgia. Among other business activities, Contel is engaged in the business of providing cellular, telecommunications service.

7. Contel of Illinois is a corporation incorporated under the laws of the State of Illinois, with its principal place of business in Sycamore, Illinois. Contel of Illinois is engaged in the business of owning and operating a cellular telecommunications system in Rockford, Illinois.

8. Venue is proper in this County pursuant to Ill. Rev. State. ch. 110, ¶¶ 2-101 and 2-102 since defendant is doing business in this County.

BACKGROUND

9. The Federal Communications Commission ("FCC") regulates the cellular telecommunications industry in the United States. As one aspect of that regulation, the FCC has divided the United States into defined geographic service areas or markets for purposes of providing cellular telephone service to the public. The more urban areas served are called Metropolitan Statistical Areas ("MSAs"), while the more rural areas are called Rural Service Areas ("RSAs"). Each MSA is typically surrounded by and adjoins several RSAs.

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one cellular system to a telephone company having a wireline presence in the area ("wireline operator"), and awards the authorization to construct and operate the other cellular system to an entity which is not a telephone company ("non-wireline operator"), selecting among those entities submitting applications for that particular area.

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24% limited partnership interest (Contel transferred its interest in the Partnership to Contel of Illinois on or after July 9, 1987), Central Cellular is a limited partner, holding a 20% limited partnership interest, Central Cellular is a limited partner, holding a 20% limited partnership interest, and Ameritech is a limited partner, holding a 1% limited partnership interest.

15. Although Contel of Illinois is nominally the General Partner of the Partnership, its parent Contel executed the Partnership Agreement and at all times pertinent hereto has retained ultimate control of the Partnership. Contel therefore has certain contractual and fiduciary obligations to the Partnership and its limited partners.

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23. Under Section 8.8 of the Partnership Agreement, Contel's application to provide cellular service in Illinois RSA 1 should have been made on behalf of the Partnership, because Illinois RSA 1 is an area adjoining the Rockford MSA.

24. Despite repeated demands by United States Cellular Investment Company of Rockford ("USCIC Rockford"), which owns a 49% interest in Central Cellular, Contel and Contel of Illinois have willfully failed and refused to acknowledge that Contel's application to provide cellular service in Illinois RSA 1 should have been made on behalf of the Partnership or to share the benefits of the rights they ultimately received, through approval of that application, to provide cellular service in Illinois RSA 1 with the Partnership.

25. By refusing to acknowledge that Contel's application to provide cellular service in Illinois RSA 1 should have been made on behalf of the Partnership, and by refusing to share the fruits and benefits of that application with the Partnership, and particularly to share the rights they have thereby gained to provide cellular

service in Illinois RSA 1, Contel and Contel of Illinois have breached the Partnership Agreement.

26. Central Cellular has been and continues to be damaged by Contel's and Contel of Illinois' breach of the Partnership Agreement, in that it has not been and is not receiving its proportionate share of the income and business opportunities generated by the cellular system in Illinois RSA 1, that properly belong to the Partnership but that have been usurped by Contel and Contel of Illinois for themselves alone.

WHEREFORE, plaintiff Central Cellular requests that the Court enter judgment in favor of Central Cellular and against defendants, and award the following relief:

a. an accounting of revenues generated by the cellular system in Illinois RSA I and profits earned therefrom by defendants;

b. an injunction requiring defendants to share with the Partnership any and all benefits attributable to defendants' interest in Illinois RSA 1;

c. compensatory damages in an amount to be determined at trial;

d. reasonable expenses, including reasonable

attorney's fees as provided by 805 ILCS 210/1004; and

e. such other and further relief as the Court deems just and appropriate.

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29. Despite repeated demands by USCIC Rockford, defendants have willfully failed and refused to share their right to provide cellular service in Illinois RSA 1 with the Partnership.

30. In making an application to provide cellular service in Illinois RSA 1 solely on their own behalf, and retaining the rights obtained solely for their own benefit and refusing to share them with the Partnership or its limited partners, defendants acted in bad faith.

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WHEREFORE, plaintiff Central Cellular requests that the Court enter judgment in favor of Central Cellular and against defendants, and award the following relief:

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f. such other and further relief as the Court deems just and appropriate.

Plaintiff demands trial by jury on all counts.

Respectfully submitted,

By: /s/ Steven W. Young
Attorneys for Central Cellular Telephones Telephones, Ltd.

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Steven W. Young
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One First National Plaza
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(312) 853-7000

PRIOR TEXT OF PART 22 RULES

47 C.F.R. § 22.39:

> (a) Approval required. Authorizations shall be transferred or assigned to another party, voluntarily (for example, by contract) or involuntarily (for example, by death, bankruptcy, or legal disability), directly or indirectly or by transfer of control of any corporation holding such authorization, only upon application and approval by the Commission.
>
> > (1) A change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control.
> >
> > (2) In other situations a controlling interest shall be determined on a case-by-case basis considering the distribution of ownership, and the relationships of the owners, including family relationships.

47 C.F.R. § 22.902:

> (a) . . . Each frequency Block available for use by cellular systems in this service shall be assigned to a single applicant in any cellular system service area . . . . Only two cellular systems may be authorized in each such area.
>
> (b) For cellular systems the assignment of frequencies will be divided into two blocks. Assignments will be made from the frequencies listed for cellular systems A and B. For initial applications for MSAs and RSAs, common carriers

not also engaged in the business of affording public landline message telephone service will be assigned frequencies from Cellular System A. Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies for Cellular System B in those areas in which they provide such landline service in some portion of the cellular market, for initial applications for MSAs and RSAs.

(5) Ownership of Cellular Systems. No person may have a direct or indirect ownership interest in licenses for both frequency blocks in overlapping CGSAs, unless such interests pose no substantial threat to competition. A licensee, a person who owns a controlling interest in a licensee, or a person who actually controls a licensee for one frequency in a CGSA may not own any direct or indirect ownership interest in the licensee a person who owns a controlling interest in a licensee, or a person who actually controls a licensee for the other frequency block in an overlapping CGSA.

(ii) Divestiture of interests as a result of a transfer of control or assignment must occur prior to consummating the transfer or assignment.

CERTIFICATE OF SERVICE

I, Douglas B. McFadden, hereby certify that on this 8th day of December, 1995, three true and correct copies of the foregoing "Petition for Writ of Certiorari" were served by first class U.S mail, postage prepaid, upon the following opposing counsel:

David F. Graham
Kathleen L. Roach
Steven W. Young
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603